

UNITED STATES DISTRICT COURT

## **SOUTHERN DISTRICT OF CALIFORNIA**

## NY NOURN,

**Petitioner.**

vs.

M. LATTIMORE.

### Respondent.

Civil No. 09-cv-2456-BEN (WVG)

## **REPORT AND RECOMMENDATION DENYING PETITION FOR WRIT OF HABEAS CORPUS**

## I. INTRODUCTION

Petitioner, Ny Nourn, a state prisoner proceeding *pro se*, has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 challenging her conviction for second degree murder. (See Lodgement No. 1. Vol. 2 at 464.) Petitioner contends that habeas relief is proper based on the following five grounds: (1) The double jeopardy clause was violated when the prosecutor argued facts to which she had been previously acquitted; (2) the prosecutor presented a legally untenable theory of liability; (3) the jury was improperly instructed; (4) there was insufficient evidence to support her conviction; and (5) Petitioner's counsel provided ineffective assistance because he failed to object on double jeopardy grounds or argue the legal untenability of the prosecution's theory at trial.

This Court has reviewed the Petition, Respondent's Answer, Petitioner's Traverse, and all supporting documents. Based on the documents and evidence presented, and for the reasons set forth below, the Court finds that Petitioner is not entitled to the relief requested and recommends that the Petition be **DENIED**.

1     II.     FACTUAL BACKGROUND

2             This Court gives deference to state court findings of fact and presumes them to be correct.  
3     See 28 U.S.C. § 2254(e)(1); see also Parke v. Raley, 506 U.S. 20, 35-36 (1992) (holding findings of  
4 historical fact, including inferences properly drawn from such facts, are entitled to statutory  
5 presumption of correctness). The pertinent facts as found by the state appellate court, and  
6 substantially taken from its opinion, are as set forth below. (See Lodgement 6 at 3-8.)

7             On December 23, 1998, David Stevens' body was found abandoned in the passenger seat of  
8 a burning car. An autopsy revealed that Stevens had been fatally shot twice in the head before his  
9 body was burned.

10            The case was unresolved for three years. However, in November 2001, Petitioner Ny Nourn  
11 contacted the San Diego Police Department and confessed her role in Stevens' murder. The following  
12 description of the events leading up to the murder is from Nourn's transcribed confession.

13            In August 1998, when Nourn was 17 years old she met Ronald Barker, then a 34-year-old  
14 married man with a child, through the Internet. Within days, they developed an intimate  
15 relationship.

16            Nourn's relationship with Barker continued through the fall of 1998. In November 1998,  
17 Nourn began working at the Perfect Match dating service. She developed a friendly relationship with  
18 her boss, David Stevens. On the evening of December 22, Nourn went on a date with Stevens. They  
19 went to his apartment and had sex. After leaving Stevens' apartment, Nourn returned home. When  
20 she arrived, she saw Barker's car parked near her house. She nervously parked and approached  
21 Barker.

22            Barker asked Nourn where she had been. At first she said she had been shopping. Barker did  
23 not believe her and Nourn admitted that she had "slept with [her] boss." Barker became angry and  
24 told her to get out of the car. Nourn said she was sorry and that it would never happen again. She  
25 then told Barker that Stevens coaxed her into having sex with him, and changed her story, stating  
26 that he had raped her. Barker replied, "I'm gonna kill him," and told Nourn she had been "violated"  
27 and was "used goods." He told Nourn to take him to Stevens' apartment so that he could confront  
28 him, and Nourn agreed to do so.

1       On their way to Stevens' apartment, Barker and Nourn stopped and had sex in the back seat  
2 of his car. Afterward, Barker suggested that he and Nourn should end their relationship. Nourn  
3 begged him not to do so, and he responded that the "[o]nly way you stay with me is if you kill David  
4 or I kill David." Nourn replied, "I do anything you say." Barker then stated that he needed to go to  
5 his house to get his gun, and Nourn followed him there.

6       Barker then told Nourn to call Stevens and tell him that she was stranded on the freeway.  
7 However, when Nourn called, Stevens did not answer. Barker and Nourn drove to Stevens'  
8 apartment.

9       They planned for Nourn to tell Stevens that her car had broken down and ask him for  
10 assistance. Barker would follow in his vehicle and when he flashed his headlights, Nourn would have  
11 Stevens pull over. They would tell Stevens that Barker was Nourn's brother.

12       When they arrived at Stevens' apartment, Nourn called him on the intercom and told him she  
13 needed help with her car. When Stevens came out, he and Nourn left in his car and traveled  
14 eastbound. Barker followed in his own car. Barker flashed his lights; Nourn told Stevens to pull over.  
15 She told Stevens that she thought the person following them was her brother. Nourn walked to  
16 Barker's car and he told her to have Stevens follow him. Nourn returned to Stevens' car and told him  
17 to follow Barker. They drove to a residential area and then stopped. Nourn introduced Barker to  
18 Stevens as her brother. They then all got into Stevens' car, with Barker in the back seat.

19       Barker directed Stevens to drive, on the pretense of looking for Nourn's car. Nourn did not  
20 say much and "just kept to [her]self." Barker then directed Stevens to pull over.

21       After Stevens pulled over, he asked, "Where's the car?" Barker grabbed Stevens by the neck  
22 and pointed the gun at his head. Barker said, "How does it feel to sleep with someone's girlfriend?"  
23 Stevens replied "[D]on't do this," and Nourn said, "No, no." Barker twice fatally shot Stevens in the  
24 head. Nourn assisted Barker in moving Stevens' car and later setting it on fire with Stevens' body  
25 inside.

26       During the following three years, Barker and Nourn's relationship continued and neither told  
27 anyone about Stevens' murder. Nourn stated that she went along with the plan because she thought  
28 that Barker would kill her if she did not.

1 Nourn denied that she wanted to see Stevens hurt or killed. She stated she liked Stevens very  
 2 much. She believed Barker would have killed her if she refused to participate in his plot to murder  
 3 Stevens. Nourn admitted Barker had never physically abused her in any way prior to Stevens' murder,  
 4 although she stated that Barker had slapped her one time on the night Stevens was killed. Nourn  
 5 asserted that although she knew Barker had a gun and had threatened to kill Stevens, she believed  
 6 he only intended to "confront" him. She believed Barker's death threats were directed at her, not  
 7 Stevens. Nourn also recognized that Barker had no idea where Stevens lived and only her assistance  
 8 led Barker to him. Nourn admitted she was alone with Stevens several times as the plot unfolded.  
 9 She acknowledged she had several opportunities to stop the murder, but did not warn Stevens or  
 10 take any actions to prevent it because she was worried about her own safety. At trial, three  
 11 psychologists testified Nourn suffered from Battered Women's Syndrome before, during and after  
 12 Stevens' murder. However, one psychologist admitted that at the time of the murder Nourn was not  
 13 so subjugated by Barker that she did not feel free to defy him by dating Stevens.

14 **III. PROCEDURAL BACKGROUND**

15 In 2003, a jury returned a verdict of first degree murder against Ny Nourn and found true a  
 16 lying in wait special circumstance allegation. (Lodgement 6 at 1.) In May 2004, the California Court  
 17 of Appeal affirmed Nourn's conviction but reversed the special circumstance finding based on  
 18 instructional error. (*Id.*) Nourn filed a writ of habeas corpus which the California Court of Appeal  
 19 granted in December 2006. (*Id.*) The court reversed Nourn's conviction for first degree murder based  
 20 on ineffective assistance of counsel. (*Id.* at 1-2.)

21 In November 2007, Nourn was again put on trial on charges of murdering David Stevens and  
 22 committing arson to his car. (*Id.*) Prior to trial, the court dismissed a special circumstance lying-in-  
 23 wait allegation. (*Id.*) After the close of the prosecution's case, the trial court granted Nourn's motion  
 24 for acquittal on the first degree murder charge. (*Id.*) The jury found Nourn guilty of second degree  
 25 murder and not guilty of arson. (*Id.*) Nourn was sentenced to 15 years to life. (*Id.*)

26 Nourn filed a direct appeal of her conviction in the California Court of Appeal, which upheld  
 27 her conviction, in a written opinion on April 27, 2009. (Lodgement 6.) Nourn then filed a petition for  
 28 review in the Supreme Court of California. (Lodgement 7.) The Supreme Court denied the petition

1 without comment. (Lodgement 8.) Nourn filed her petition for writ of habeas corpus in this Court  
 2 pursuant to 28 U.S.C. 2254 on October 28, 2009. (Doc. No. 1.) Respondent answered the petition  
 3 January 14, 2010. (Doc. No. 12.) Nourn filed her traverse to the petition February 10, 2010. (Doc. No.  
 4 14.)

5 **IV. SCOPE OF REVIEW**

6 This Petition is governed by Title 28, United States Code, § 2254, as amended by the 1996  
 7 Antiterrorism and Effective Death Penalty Act (“AEDPA”). Section 2254(a) sets forth the following  
 8 scope of review for federal habeas corpus claims:

9 The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain  
 10 an application for a writ of habeas corpus in behalf of a person in custody pursuant  
 11 to the judgment of a State court only on the ground that he is in custody in violation  
 12 of the Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a).

13 As amended, 28 U.S.C. § 2254(d) reads:

14 (d) An application for a writ of habeas corpus on behalf of a person in custody  
 15 pursuant to the judgment of a State court shall not be granted with respect to any  
 16 claim that was adjudicated on the merits in State court proceedings unless the  
 17 adjudication of the claim –

18 (1) resulted in a decision that was contrary to, or involved an  
 19 unreasonable application of, clearly established Federal law, as  
 20 determined by the Supreme Court of the United States; or

21 (2) resulted in a decision that was based on an unreasonable  
 22 determination of the facts in light of the evidence presented in the  
 23 State court proceeding. 28 U.S.C. § 2254(d)(1)-(2) (2006) (emphasis  
 24 added).

25 “AEDPA establishes a ‘highly deferential standard for evaluating state-court rulings, which demands  
 26 that state-court decisions be given the benefit of the doubt.’” Womack v. Del Papa, 497 F.3d 998,  
 27 1001 (9th Cir. 2007) (quoting Woodford v. Viscotti, 537 U.S. 19, 24 (2002)). To obtain federal habeas  
 28 relief, Petitioner must satisfy either § 2254(d)(1) or § 2254(d)(2). See Williams v. Taylor, 529 U.S. 362,  
 403 (2000). Under section 2254(d)(1), the Supreme Court has ruled that the “contrary to” clause to  
 permit a grant of habeas relief “if the state court arrives at a conclusion opposite to that reached by  
 this Court on a question of law or if the state court decides a case differently than this Court has on  
 a set of materially indistinguishable facts.” Id. at 412-13. The Supreme Court has also interpreted the  
 “unreasonable application” clause of § 2254(d)(1) to allow a grant of “the writ if the state court

1 identifies the correct governing legal principle from this Court's decisions but unreasonably applies  
 2 that principle to the facts of the prisoner's case." *Id.* at 413. The Supreme Court has clarified that  
 3 even an erroneous or incorrect application of clearly established federal law does not support a  
 4 habeas grant, unless the state court's application was "objectively unreasonable." *Lockyer v.*  
 5 *Andrade*, 538 U.S. 63, 75 (2003).

6 Where there is no reasoned decision from the state's highest court, the Court "looks through"  
 7 to the underlying appellate court decision. *See Ylst v. Nunnemaker*, 501 U.S. 797, 805-06 (1991). If  
 8 the dispositive state court order does not "furnish a basis for its reasoning," federal habeas courts  
 9 must conduct an independent review of the record to determine whether the state court's decision  
 10 is contrary to, or an unreasonable application of, clearly established Supreme Court law. *See Delgado*  
 11 *v. Lewis*, 223 F.3d 976, 981-82 (9th Cir. 2000) (overruled on other grounds by *Lockyer*, 538 U.S. at 75-  
 12 76). However, a state court need not cite Supreme Court precedent when resolving a habeas corpus  
 13 claim. *Early v. Packer*, 537 U.S. 3, 8 (2002). Absent citations to Supreme Court precedent, habeas  
 14 relief is not merited if the state court decision neither contradicts the reasoning nor the result of  
 15 Supreme Court rulings. *Id.*

16 **V. DISCUSSION**

17 Petitioner Nourn presents the Court with five claims for habeas relief. She argues that (1) the  
 18 double jeopardy clause was violated when the prosecutor argued facts to which she had been  
 19 previously acquitted; (2) the prosecutor presented a legally untenable theory of liability; (3) the jury  
 20 was improperly instructed; (4) there was insufficient evidence to support a second degree murder  
 21 conviction; and (5) Petitioner's counsel provided ineffective assistance because he failed to object  
 22 to the double jeopardy violation or the legally untenable theory.

23 **A. The Double Jeopardy Clause Was Not Violated When The Prosecutor Argued Facts Which  
 24 Were Relevant to Both First and Second Degree Murder**

25 Nourn contends that double jeopardy principles were violated when the prosecution argued  
 26 facts to which she was acquitted. (Petition, Points and Authorities, at 25.) Nourn is not entitled to  
 27 habeas relief on this issue because no double jeopardy principles were implicated where the trial  
 28

1 court acquitted Nourn of first degree murder and the prosecution argued a second degree murder  
2 theory.

3 At the close of the prosecution's case, Nourn's counsel moved for the trial court to acquit  
4 Nourn of murder under California Penal Code Section 1118.1. The trial court acquitted Nourn of first  
5 degree murder only, concluding that, "Ms. Nourn did not believe that Mr. Barker would actually  
6 engage in the ultimate act of such enormity as the cold blooded murder that he did." (RT at 224.)  
7 Nonetheless, the court allowed a second degree murder charge to stand. (RT at 225.) The trial court  
8 reasoned that "a person can be convicted of a second degree murder ... based on an implied malice  
9 theory, which does not necessarily require an intent to kill." (RT at 212.) Ms. Nourn's counsel  
10 acknowledged that "one of the issues could be: (sic) was she reckless or was she negligent? And that,  
11 wherein would be the difference in voluntary manslaughter and second degree murder." (*Id.*) The  
12 trial court further clarified that "there could be a basis for an implied malice, even absent intent to  
13 kill. If you're inviting somebody out to a threat that you believe is lethal and do that in conscious  
14 disregard and so forth ... that could support implied malice." (RT at 225.) The court briefly mused  
15 "whether she [Nourn] shared any intent to kill." (RT at 225.) However, the court quickly disposed of  
16 its doubt noting that, "I don't need to decide that ... because the concept[s] of implied malice and  
17 second degree murder... no longer necessarily require... an intent to kill." (RT at 225.) After the close  
18 of all the evidence, the defense renewed its motion for acquittal under California Penal Code Section  
19 1118.1. Nourn's counsel reiterated the argument that "no substantial evidence of malice" had been  
20 introduced. (RT at 700.) The trial court disagreed and denied the motion allowing the second degree  
21 murder charge to go to the jury. (RT at 700.)

22 At closing argument, the prosecutor contended that Barker had engaged in cold blooded  
23 murder. (RT at 718.) However, the prosecutor clearly explained that Nourn, as an aider and abettor,  
24 did not need to share Barker's specific intent to kill, nor did Nourn have that intent. (RT at 718.)  
25 Nourn's intent, as correctly described by the prosecutor, merely had to be "to facilitate and aid that  
26 murder." (RT at 718.) The prosecutor argued Nourn "had that specific intent to aid and abet Ronald  
27 Barker pulling the trigger and killing David Stevens. She didn't have to intend that act herself... to  
28

1 intend that David Stevens die." (RT at 719.) It is this argument that Nourn submits violated her right  
 2 against double jeopardy.

3 Nourn raised her double jeopardy argument in her state appeal. The Court of Appeal rejected  
 4 it. (Lodgement 6.) She then filed a petition for review in the California Supreme Court which denied  
 5 her petition without comment. (Lodgement 8.) The last reasoned state decision which addressed the  
 6 merits of the claim is the California Court of Appeal's opinion affirming the verdict. (Lodgement 6.)  
 7 It is to that decision this Court must direct its analysis. Ylst, 501 U.S. at 805-6.

8 The Court of Appeal held that the double jeopardy clause was not violated when the  
 9 prosecutor argued Nourn was guilty of second degree murder. (Lodgement 6 at 11.) The trial court  
 10 specifically excluded second degree murder from its ruling acquitting Nourn of first degree murder.  
 11 (Lodgement 6 at 11.) The appellate court recognized that because "the court explicitly refused to  
 12 enter judgment on the lesser offense of second degree murder and found that theory of liability  
 13 remained ... no double jeopardy principles were implicated by trial of the second degree murder  
 14 charge." (Lodgement 6 at 11.)

15 The appellate court properly identified Smith v. Massachusetts as the relevant case  
 16 controlling double jeopardy attachment in court issued acquittals. See Smith v. Massachusetts, 543  
 17 U.S. 462 (2005). While the Smith Court did find a violation of double jeopardy where the trial court  
 18 reconsidered its unqualified acquittal order, the holding is properly distinguishable here. See id. at  
 19 474. The appeals court found significant the fact that the trial court's acquittal in Smith, "was without  
 20 qualification" (Lodgement 6 at 11-12) whereas at Nourn's trial, the trial court specifically limited its  
 21 acquittal ruling to pertain only to the first degree murder charge. (RT at 224.) The appeals court  
 22 concluded that "nothing in the Smith decision prohibits a trial court from limiting an acquittal ruling  
 23 allowing a lesser offense to proceed, as the court did in this case." (Lodgement 6 at 12.)

24 The appellate court neither reached a decision contrary to nor unreasonably applied clearly  
 25 established law in determining that there was no double jeopardy violation. The Double Jeopardy  
 26 Clause "protects against a second prosecution for the same offense after acquittal" and "protects  
 27 the accused from attempts to relitigate the facts underlying a prior acquittal." Brown v. Ohio, 432  
 28 U.S. 161, 165 (1977). It "prohibits reexamination of a court-decreed acquittal to the same extent it

1 prohibits reexamination of an acquittal by jury verdict." Smith v. Massachusetts, 543 U.S. 462, 467  
 2 (2005). If the acquittal is issued before a conviction, "further proceedings to secure one are  
 3 impermissible." Id. However, "[t]he trial judge's characterization of his own ruling is not controlling  
 4 for purposes of double jeopardy, ...[rather the] inquir[y] is..." "whether the ruling of the [trial] judge,  
 5 whatever its label, actually represents a resolution, correct or not, of some or all of the factual  
 6 elements of the offense charged." Price v. Vincent, 538 U.S. 634, 640 (2003) (quoting United States  
 7 v. Martin Linen Supply Co., 430 U.S. 564 (1977).)

8 Nourn contends that the trial court's acquittal meant that she "was found not to have aided  
 9 and abetted Barker's plan to kill Stevens" and consequently "the People could no longer argue that  
 10 appellant knew of and intended to assist Barker in any form of murder, whether express or implied,  
 11 based on a general aider and abettor theory." (Petition, Points and Authorities, at 27.) She further  
 12 argues that the "Prosecution could not do ... what it did do, [which] was to factually argue that she  
 13 aided and abetted a premeditated murder for which she was acquitted." (Traverse at 7.) Petitioner  
 14 argues that akin to Smith, she was "subjected to post acquittal fact finding proceedings going to her  
 15 guilt or innocence although she had already been acquitted of the very same factual determination."  
 16 (Traverse at 7 quoting Smith v. Massachusetts, 543 U.S. at 467.)

17 Petitioner's contentions lack merit. Nourn incorrectly argues that the prosecutor elected to  
 18 remove second degree malice murder from consideration. (Traverse at 9.) In fact, implied malice was  
 19 the only malice theory before the jury. (RT at 707-08.) As the Court of Appeal recognized, the Smith  
 20 acquittal was unqualified, id. at 465, whereas when the trial court ruled on Nourn's motion to acquit,  
 21 the court specifically carved out second degree murder and lesser included offenses like  
 22 manslaughter from its order, and granted the motion as to first degree murder only. (RT at 225.) As  
 23 outlined above, and noted by the Court of Appeal, nothing in Smith v. Massachusetts, limits the trial  
 24 court's ability to exclude lesser included offenses from its ruling. 543 U.S. 462.

25 Additionally, the Court of Appeal aptly noted that "nowhere in the court's ruling did it find  
 26 ... [Nourn] had no knowledge Barker intended to kill Stevens.... [Rather] the court only found ... she  
 27 [did not] share the same level of premeditation and deliberation [as] Barker." (Lodgement 6 at 13.)  
 28 The trial court's doubt that Nourn shared any intent to kill was not part of its ruling. As the Court  
 specifically noted, "I don't need to decide that." (RT at 225.) Contrary to Nourn's contentions, the

1 court's acquittal was not "a conclusive factual determination that the People failed to prove beyond  
 2 a reasonable doubt that appellant knew and intended to facilitate Barker's willful, deliberate, and  
 3 premeditated plan to kill Stevens." (Petition, Points and Authorities, at 27.) The court merely ruled  
 4 that based on the evidence presented, Nourn did not share Barker's premeditation. (RT at 225.) Thus,  
 5 the court left open the possibility of Nourn's conviction for second degree murder.

6       Further unlike the facts presented in Smith, where the trial court impermissibly reconsidered  
 7 its own ruling, here, Nourn argues that it was the prosecutor's actions, not the court's, that violate  
 8 double jeopardy. However, the prosecution was not barred from arguing that Nourn was guilty of  
 9 second degree murder. As the trial court specifically ruled, implied malice murder was to "remain  
 10 before the jury." (RT at 225.) The prosecutor was careful to argue that Nourn was not on trial for first  
 11 degree premeditated murder. The prosecutor explained that second degree aiding and abetting  
 12 liability meant that Nourn "had that specific intent to aid and abet Ronald Barker pulling the trigger  
 13 and killing David Stevens. She didn't have to intend that act herself... to intend that David Stevens  
 14 die." (RT at 719.) This argument presents a theory of aiding and abetting a second degree implied  
 15 malice murder. Under the court's first degree acquittal ruling, the prosecution's argument properly  
 16 presented a second degree murder theory. This did not violate double jeopardy principles unlike  
 17 Smith v. Massachusetts, because there was no further fact finding regarding first degree murder. See  
 18 543 U.S. at 467. Petitioner was acquitted of first degree murder, the prosecution argued a theory of  
 19 second degree implied malice murder, and consequently no double jeopardy violation occurred. For  
 20 the reasons stated above, the Court recommends this claim be **DENIED**.

21       **B. Nourn's Conviction Was Not Based on an Untenable Legal Theory**

22       Nourn's second ground for habeas relief challenges the legal theory upon which she was  
 23 convicted. Nourn contends she was convicted on an impermissible theory of law. (Petition, Points  
 24 and Authorities, at 21.)

25       On appeal to the state court, Nourn challenged the legal tenability of the prosecution's  
 26 theory. The California Court of Appeal denied Nourn's appeal. She then filed a petition for review in  
 27 the California Supreme Court which denied her petition without comment. (Lodgement 8.) The last  
 28 reasoned state decision which addressed the merits of the claim is the California Court of Appeal's

1 opinion affirming Nourn's conviction on a second degree implied murder theory. (Lodgement 6.) It  
 2 is to that decision this Court must direct its analysis. Ylst, 501 U.S. at 805-06. On appeal, the state  
 3 court affirmed Nourn's conviction for second degree murder, concluding that although Nourn "did  
 4 not share [Barker's] premeditation and deliberation[, it] had no impact on her liability as an aider and  
 5 abettor to second degree murder." (*Id.* at 14.) The court found that "Barker's specific intent to kill  
 6 is not incompatible with Nourn's conviction for implied malice murder." (Lodgement 6 at 13.)

7 In its opinion denying Nourn's habeas claim, the Court of Appeal attempted to dissect the  
 8 confusing language with which the California Supreme Court defines the requisite mental state of  
 9 an aider and abettor. The Court of Appeal explained that "an aider and abettor's liability is not  
 10 dependent upon, or affected by, the disposition of the charges against the direct perpetrator."  
 11 (Lodgement 6 at 14, quoting People v. Garcia, 28 Cal. 4th 1166, 1173 (2002).) The court clarified that  
 12 although the California Supreme Court opined that the "aider and abettor must share the  
 13 [perpetrator's] specific intent" the phrase is applied to mean that the aider and abettor "knows the  
 14 full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or  
 15 purpose of facilitating the perpetrator's commission of the crime." (Lodgement 6 at 14 quoting  
 16 People v. McCoy, 25 Cal. 4th 1111, 1118 (2001).) The court confirmed that "aider and abettor liability  
 17 does not require proof of the specific intent that is an element of the underlying offense."  
 18 (Lodgement 6 at 14, quoting People v. Mendoza, 18 Cal. 4th 1114, 1123 (1998).) The court specified  
 19 that the jury had to find only "the intent to encourage and bring about the conduct that is criminal,  
 20 not the specific intent that is an element of the target offense." (Lodgement 6 at 14.) In essence, the  
 21 Court of Appeal confirmed that the jury had to find Nourn knowingly helped Ronald Barker kill David  
 22 Stevens, not that Nourn wanted to kill David Stevens.

23 The appellate court also explained why the jury properly found that Nourn had the requisite  
 24 mental state to be convicted of second degree murder as an aider and abettor to Barker's plan. The  
 25 court reasoned that implied malice arises under two circumstances, either when the killing reveals  
 26 an abandoned and malignant heart, or "when the killing results from an intentional act, the natural  
 27 consequences of which are dangerous to life, [and the] act was deliberately performed by a person  
 28 who knows that his conduct endangers the life of another and who acts with conscious disregard for

1 life." (Lodgement 6 at 13, quoting People v. Swain, 12 Cal. 4th 593, 600 (1996).) Under the reasoning  
 2 provided by the Court of Appeal, Nourn was guilty of second degree murder because the jury must  
 3 have found that Nourn knew that Barker's acts either demonstrated a malignant heart or she  
 4 consciously disregarded known risks dangerous to human life, and knowing this, she nonetheless  
 5 aided Barker.

6 Nourn contends that the theory grounding her conviction was untenable because "appellant  
 7 [Nourn] could not aid and abet a perpetrator who intended to kill on a theory of shared implied  
 8 malice murder." (Petition, Points and Authorities, at 21.) However, federal courts are bound by a  
 9 state court's construction of its own penal statutes, and must defer to that interpretation, unless it  
 10 is "untenable or amounts to a subterfuge to avoid federal review of a constitutional violation."  
 11 Aponte v. Gomez, 993 F.2d 705, 707 (9th Cir. 1993).

12 The appeals court found that Nourn was convicted on a legally tenable theory of law. Nourn  
 13 was convicted of aiding and abetting a second degree murder on an implied malice theory. (See  
 14 Lodgement No. 1., Vol. 2, at 464). California law permits an aider and abettor to be convicted of  
 15 second degree murder while the perpetrator was convicted of first degree murder. See People v.  
 16 Woods, 8 Cal. App. 4th 1570, 1581 (1992.).

17 The California Penal Code defines murder as "the unlawful killing of a human being... with  
 18 malice aforethought." Cal. Penal Code § 187. Malice is "implied, when no considerable provocation  
 19 appears, or when the circumstances attending the killing show an abandoned and malignant heart."  
 20 Cal. Penal Code § 188. The statute also defines first degree murder, and clarifies that "[a]ll other  
 21 kinds of murder are of the second degree." Cal. Penal Code § 189. California law holds persons who  
 22 aid and abet a crime, liable for that crime. See Cal. Penal Code § 31.

23 The California Supreme Court has identified an aider and abettor as a person who, "acting  
 24 with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of  
 25 committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids,  
 26 promotes, encourages or instigates, the commission of the crime." People v. Prettyman, 14 Cal. 4th  
 27 248, 259 (1996) (citing People v. Beeman, 35 Cal. 3d 547, 561 (1984)). One who aids and abets a  
 28 specific intent crime must "share the specific intent of the perpetrator." Beeman, 35 Cal. 3d at 560.

1 As parsed by the Court of Appeal, noted above, this confusing statement is applied to mean that the  
 2 aider and abettor must know “the full extent of the perpetrator’s criminal purpose and give[] aid or  
 3 encouragement with the intent or purpose of facilitating the perpetrator’s commission of the crime.”  
 4 Id. As explained above, Nourn demonstrated the requisite intent and aid to Barker. No Supreme  
 5 Court law invalidates Petitioner’s second degree murder conviction under the theory of aiding and  
 6 abetting a second degree murder, for which the perpetrator was convicted of a first degree killing.  
 7 Thus, the theory is neither untenable nor a subterfuge and the state court’s denial of this claim was  
 8 neither contrary to, nor an unreasonable application of clearly established Supreme Court law. See  
 9 28 U.S.C. § 2254(d); Williams v. Taylor, 529 U.S. 362, 403 (2000). The Court recommends this claim  
 10 be **DENIED**.

11 **C. The Jury Instructions Did Not Violate Due Process**

12 In her traverse, Nourn challenges the jury instructions claiming that they lacked “the mens  
 13 rea elements of aider and abettor liability as to whether Petitioner shared Barker’s murderous  
 14 intent.” (Traverse at 5.) Cryptically, Nourn also argues that the trial court’s failure to include a natural  
 15 and probable consequences instruction eliminated a viable theory on which she could have been  
 16 convicted. (Traverse at 6.) While Nourn’s appeals touched on this jury instruction argument, the  
 17 appeals court did not address Nourn’s argument in its written opinion affirming her conviction. (See  
 18 Lodgement 6.)

19 The trial court instructed the jury on the requisite mental state to convict Nourn of second  
 20 degree murder. At the close of trial, the court presented the jury with the instruction that “the  
 21 people must prove not only that the defendant did the acts charged, but also that she acted with  
 22 particular intents and mental states. The instruction for each crime and the instructions for aiding  
 23 and abetting will explain for you the intent and mental states required.” (Calcrim 225 (excerpt); RT  
 24 at 688; CT 346.) The trial court clarified that “as to any crime where the people’s theory that Ms.  
 25 Nourn is guilty in that she aided and abetted Mr. Barker in the commission of the crime, the mental  
 26 states of specific intent and knowledge must be proved. The specific intent for aiding and abetting  
 27 and knowledge are explained in the instructions for aiding and abetting.” (Calcrim 252(excerpt); RT  
 28 at 692; CT at 350.) The trial court further instructed the jury that to find Nourn guilty as an aider and

1 abettor in Stevens' murder they must find the following four elements: "one, the perpetrator ...  
 2 committed the crime; two, the defendant [Nourn] knew that the perpetrator [Barker] intended to  
 3 commit the crime; three, that before or during the commission of the crime, the defendant [Nourn]  
 4 intended to aid and abet the perpetrator [Barker] in committing the crime; ... [a]nd four, the  
 5 defendant's [Nourn's] words or conduct did, in fact aid and abet the perpetrator's [Barker's]  
 6 commission of the crime." (Calcrim 401, RT at 705; CT at 373.) The trial court instructed that  
 7 "[s]omeone aids and abets a crime if ... she knows of the perpetrator's unlawful purpose, and ... she  
 8 specifically intends to, and does, in fact, aid, facilitate, promote, encourage or instigate the  
 9 perpetrator's commission of the crime." (*Id.*)<sup>1</sup>

10 To the extent that Nourn challenges the jury instructions issued on California accomplice  
 11 liability laws, this claim is not properly before the court in a federal habeas proceeding. See 28 U.S.C.  
 12 § 2254; Gutierrez v. Griggs, 695 F.2d 1195, 1197 (9th Cir. 1983). However, a federal habeas court can  
 13 overturn a conviction "where the instruction 'by itself so infected the entire trial that the resulting  
 14 conviction violates due process.'" Quigg v. Crist, 616 F.2d 1107, 1111 (9th Cir. 1980) (quoting Cupp  
 15 v. Naughten, 414 U.S. 141, 147 (1973)). Further, [an] omission, or an incomplete instruction, is less  
 16 likely to be prejudicial than a misstatement of the law." Henderson v. Kibbe, 431 U.S. 145, 155  
 17 (1977). Additionally, the alleged error cannot be judged in isolation. Estelle v. McGuire, 502 U.S. 62,  
 18 72 (1991). Rather, it must be considered in the context of the entire trial record and the instructions  
 19 as a whole. *Id.*; see also Gilmore v. Taylor, 508 U.S. 333, 343-44 (1993) (finding that the right to  
 20 present a complete defense does not entitle a defendant to a particular set of jury instructions).  
 21 Even if there was constitutional error, petitioner must establish prejudice. Brecht v. Abrahamson,  
 22 507 U.S. 619, 637 (1993). This Court must determine, therefore, whether the aiding and abetting  
 23 instructions given violated Nourn's due process rights.

24 \_\_\_\_\_  
 25 <sup>1</sup>The court also instructed the jury on malice required for murder. "The people must prove that, one the  
 26 defendant committed an act that caused the death of another person; and, two, when the defendant acted, she had a  
 27 state of mind called malice aforethought." (Calcrim 520; RT at 707; CT at 375.) The court explained that "[a] defendant  
 28 acts with malice or has that state of mind if, one, ... she intentionally committed an act; two, the natural consequences  
 of the act were dangerous to human life; three, at the time ... she acted, ... she knew the act was dangerous to human  
 life; and four, ... she deliberately acted with conscious disregard for human life." (*Id.*) During deliberation the jury asked  
 for clarification regarding the natural consequences described in the implied malice instruction. The court responded  
 "[a]nother way to view the natural consequences of the act were dangerous to human life," is that it is an act having a  
 high probability of death." (CT at 395.)

1       The Ninth Circuit has noted that “[i]nstructions that allow a jury to convict without finding  
 2 every element of the offense violate the In re Winship, 397 U.S. 358 (1970), requirement that ‘every  
 3 fact necessary to constitute the crime’ must be proven beyond a reasonable doubt.” Keating v. Hood,  
 4 191 F.3d 1053, 1061 (9th Cir. 1999). In such instances, constitutional error is presumed, and the court  
 5 must determine whether that error was harmless. Id. This is not a Winship-type case, however,  
 6 because the instructions did not omit any element of aiding and abetting or murder. The California  
 7 Supreme Court has identified an aider and abettor as follows: an aider and abettor is a person who,  
 8 “acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose  
 9 of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids,  
 10 promotes, encourages or instigates, the commission of the crime.” People v. Prettyman, 14 Cal. 4th  
 11 248, 259 (1996) (citing People v. Beeman, 35 Cal. 3d 547, 561 (1984)). This court must accept the  
 12 California Supreme Court’s identification of the elements of the offense. See Illinois v. Vitale, 447 U.S.  
 13 410, 416 (1980); Newton v. Superior Court of California, 803 F.2d 1051, 1058 (9th Cir.1986).

14       Nourn contends that the jury instructions failed to include the appropriate requisite mental  
 15 state to convict her of second degree murder. The Ninth Circuit analyzed a similar issue in Willard  
 16 v. People of State of California, 812 F.2d 461, 463 (9th Cir. 1987). The Ninth Circuit reviewed an aiding  
 17 and abetting jury instruction held erroneous under state law because it failed to include California’s  
 18 requirement of specific intent. Upon reviewing this instruction, the Ninth Circuit failed to find a  
 19 violation of due process. The Ninth Circuit concluded that,

20       “[D]ue process--independent of state law--does not require that an aiding and abetting  
 21 charge contain a distinct instruction regarding specific intent. In Nye & Nissen v. United  
 22 States, 336 U.S. 613 (1949), the Supreme Court upheld a conviction under the federal aiding  
 23 and abetting statute. The Court found no error in the trial court’s charge that one “‘who  
 24 aids, abets, counsels, commands, induces, or procures the commission of an act is as  
 25 responsible for that act as if he committed it directly,’” Id. at 618, even though the jurors  
 26 were given no further explanation of the terms involved, see id. at 628, (Murphy, J.,  
 27 dissenting); accord United States v. Rosa, 705 F.2d 1375, 1380-81 (1st Cir.1983). The Nye  
 28 & Nissen Court was satisfied that the “defendant ‘in some sort associate[d] himself with the  
 venture, that he participate[d] in it as in something that he wishe[d] to bring about, that he  
 [sought] by his action to make it succeed.’” 336 U.S. at 619 (quoting United States v. Peoni,  
 100 F.2d 401, 402 (2nd Cir.1938)); accord United States v. Mehrmanesh, 682 F.2d 1303,  
 1308-09 (9th Cir.1982).” Willard v. People of State of Cal., 812 F.2d 461, 463 (9th Cir. 1987).  
 In the present case, Petitioner has not shown that the instruction that neglected “the mens rea  
 elements of aider and abettor liability as to whether Petitioner shared Barker’s murderous intent”

1 so infected the entire trial that the resulting conviction violated her right to due process. See Estelle,  
 2 502 U.S. at 72; Traverse at 5. Here, the trial court's jury instructions comported with California aiding  
 3 and abetting law. See People v. Prettyman, 14 Cal. 4th 248, 259 (1996). The jury instructions properly  
 4 stated that Nourn had to know of Barker's unlawful purpose to murder Stevens; Nourn must have  
 5 intended to aid, and actually aid, Barker in that murder. (Calcrim 401(excerpt); RT at 705; CT at 373.)

6 Furthermore Nourn cannot demonstrate a violation of due process because, as noted by the  
 7 appellate court, and in detail in the claim below, there was sufficient evidence for the jury to find  
 8 that Nourn aided and abetted a second degree murder. As the California Court of Appeal found, "the  
 9 jury could convict Nourn of second degree murder as an aider and abettor based upon evidence  
 10 [that:] (1) Barker either intended to kill the victim or intended to shoot the victim; (2) Nourn acted  
 11 to facilitate the commission of the offense; and (3) she did so with knowledge of Barker's purpose  
 12 and the intent or purpose of committing, encouraging, or facilitating the commission of the offense."  
 13 (Lodgement 6 at 17.) The appellate court further reasoned Nourn "knew Barker intended to kill  
 14 Stevens.... When Barker suggested he and Nourn should end their relationship, she begged him, "No,  
 15 no, please I want to stay with you." (Lodgement 6 at 15.) Nourn agreed to do "anything you say" and  
 16 Barker instructed "the only way you stay with me is if you kill David or I kill David." (Lodgement 6 at  
 17 15.) Barker then announced they must get his gun from his house. (Lodgement 6 at 15.) The appeals  
 18 court considered this to be "substantial evidence of Nourn's knowledge of Barker's intent to kill  
 19 Stevens and her liability as an aider and abettor of that crime." Id. Nourn "lead ... [Barker] to Stevens,  
 20 and lured Stevens out of his home. She also acknowledged she was alone with Stevens for significant  
 21 periods of time prior to the murder and had numerous opportunities to prevent the  
 22 crime."(Lodgement 6 at 17.)

23 Nourn also contends that the jury instructions prejudiced her because the jury was not  
 24 instructed on the natural and probable consequences theory of aiding and abetting. (See Calcrim  
 25 402.) Nourn implicitly argues that had the natural and probable consequences theory been provided  
 26 to the jury, she may have been found guilty of aiding and abetting an assault, a natural and probable  
 27 consequence of which, was David Stevens' death. (See Traverse at 5 n.4, 6.) This argument is similarly  
 28 unavailing.

1 Nourn cannot show that the trial court's failure to give the natural and probable  
 2 consequences theory violated due process because the jury was instructed on the lesser included  
 3 offenses of involuntary manslaughter, simple assault, and simple battery. (Calcrim 580, 915, 960; RT  
 4 at 708-712; CT at 377-381.) The jury was instructed further that duress was a defense to involuntary  
 5 manslaughter. (Calcrim 3402.) Despite these instructions, the jury found Nourn guilty of aiding and  
 6 abetting a second degree murder. The jury rejected the opportunity to absolve Nourn of culpability  
 7 for Stevens' death by holding her responsible for lesser included offenses. Instead, the jury  
 8 specifically concluded the evidence proved beyond a reasonable doubt that Nourn was responsible  
 9 for a second degree murder.

10 Petitioner is not entitled to federal habeas relief on her claim asserting improper jury  
 11 instructions. Petitioner has not shown that the alleged "error, in the whole context of the particular  
 12 case, had a substantial and injurious effect or influence on the jury's verdict." Brecht, 507 U.S. at 637.  
 13 Rather, the jury was properly instructed as to the elements of aiding and abetting liability. In addition  
 14 to second degree murder, the jury was also instructed on both lesser included offenses and a duress  
 15 defense that would have negated Nourn's culpability for Stevens' murder. Nonetheless, the jury  
 16 rejected this theory. Petitioner cannot demonstrate any violation of due process because the jury  
 17 declined to convict Nourn of manslaughter or assault, and similarly rejected the corresponding  
 18 defense of duress. The Court recommends this claim be **DENIED**.

19 **D. There Was Substantial Evidence To Support A Second Degree Murder Conviction**

20 Nourn contends that there was insufficient evidence for the jury to convict her of second  
 21 degree murder because she did not share Barker's intent to commit premeditated murder. (Petition,  
 22 Points and Authorities, at 51.)

23 On appeal to the state court, Nourn challenged the sufficiency of evidence upon which she  
 24 was convicted. The California Court of Appeal denied Nourn's appeal. She then filed a petition for  
 25 review in the California Supreme Court which denied her petition without comment. (Lodgement 8.)  
 26 The last reasoned state decision which addressed the merits of the claim is the California Court of  
 27 Appeal's opinion affirming Nourn's conviction on a second degree implied murder theory.  
 28 (Lodgement 6.) It is to that decision this Court must direct its analysis. Ylst, 501 U.S. at 805-06.

1 Petitioner claims that there is no substantial evidence to support her second degree murder  
 2 conviction. Specifically Nourn challenges that “the evidence failed to prove appellant had subjective  
 3 awareness or conscious disregard for Stevens’ life sufficient for a rational trier of fact to find her  
 4 guilty of implied malice murder.” (Petition, Points and Authorities, at 51.)

5 The Court of Appeal denied this claim, holding:

6 A “conviction of second degree murder, based upon a theory of implied malice,  
 7 requires proof that the defendant acted with a conscious disregard of a known  
 8 danger to human life. Thus the jury could convict Nourn of second degree  
 9 murder as an aider and abettor based upon evidence (1) Barker either intended  
 10 to kill the victim or intended to shoot the victim; (2) Nourn acted to facilitate the  
 11 commission of the offense; and (3) she did so with knowledge of Barker’s  
 12 purpose and the intent or purpose of committing, encouraging, or facilitating  
 13 the commission of the offense. ....There is substantial evidence, based upon her  
 14 statements to the police, that Nourn knew Barker intended to kill Stevens and  
 15 participated in his plan. Barker was only able to complete the crime with  
 16 Nourn’s assistance. She led him to Stevens, and lured Stevens out of his home.  
 17 She also acknowledged she was alone with Stevens for significant periods of  
 18 time prior to the murder and had numerous opportunities to prevent the crime.  
 19 However Nourn failed to warn Stevens or take any other action to prevent the  
 20 murder. She deliberately acted in conscious disregard for Stevens’s (sic) life and  
 21 was intimately involved in facilitating, encouraging and instigating each state of  
 22 the events leading up to the murder. Her actions thus provide substantial  
 23 evidence she aided the murder of Stevens.” (Lodgement 6 at 16-17.)

24 The appellate court also concluded that the three elements of aider and abettor liability,  
 25 “(a)the direct perpetrator’s actus reus, (b) the aider and abettor’s mens rea (knowledge  
 26 of the perpetrator’s unlawful intent and an intent to assist in achieving those unlawful  
 27 ends) and (c) the aider and abettor’s actus reus” were met because Nourn “knew Barker  
 28 intended to kill Stevens, and aided and abetted in Barker’s commission of that crime.” (*Id.*  
 29 at 14-15.) The court implicitly noted Nourn’s mental state of implied malice and  
 30 knowledge that Barker wanted to kill Stevens by pointing specifically to Nourn’s actions  
 31 of begging Barker to not end the relationship, Barker’s clear statement that to keep their  
 32 relationship alive “either you [Nourn] kill David or I kill David, and Nourn’s response that  
 33 “I do anything you say.” (*Id.* at 15.) Finally, Barker indicated that he needed to go to his  
 34 house for his gun. (*Id.*) The appeals court considered this to be “substantial evidence of  
 35 Nourn’s knowledge of Barker’s intent to kill Stevens and her liability as an aider and  
 36 abettor of that crime.” *Id.*

1       In a sufficiency of the evidence claim, the court must determine whether any  
 2 rational trier of fact could have found proof of guilt beyond a reasonable doubt. Wright  
 3 v. West, 505 U.S. 277, 290 (1992); Jackson v. Virginia, 443 U.S. 307, 324 (1979); Mikes v.  
 4 Borg, 947 F.2d 353, 356 (9th Cir. 1991). In making this determination, the Court is not  
 5 authorized “to ask itself whether it believes that the evidence at the trial established guilt  
 6 beyond a reasonable doubt.” Jackson v. Virginia, 443 U.S. at 318-19. The court must view  
 7 the evidence in the light most favorable to the prosecution, and must presume the trier  
 8 of fact resolved conflicting evidence in favor of the prosecution. Wright v. West, 505 U.S.  
 9 at 296-97; Jackson v. Virginia, 443 U.S. at 319, 326; Taylor v. Stainer, 31 F.3d 907, 908-09  
 10 (9th Cir. 1994). If the evidence was insufficient to support the verdict, the remedy is to  
 11 grant an unconditional writ of habeas corpus, barring retrial of Petitioner. See Burks v.  
 12 United States, 437 U.S. 1, 18 (1978); Greene v. Massey, 437 U.S. 19, 24 (1978).

13       Under California law, “[s]econd degree murder is the unlawful killing of a human  
 14 being with malice aforethought but without the additional elements, such as willfulness,  
 15 premeditation, and deliberation, that would support a conviction of first degree murder.”  
 16 People v. Knoller, 41 Cal.4th 139, 151 (2007); People v. Nieto Benitez, 4 Cal.4th 91, 102  
 17 (1992). “Malice, for the purpose of defining murder, may be express or implied.” Nieto  
 18 Benitez, 4 Cal.4th at 102; Knoller, 41 Cal.4th at 151; see Cal. Penal Code § 188. Malice “is  
 19 implied when no considerable provocation appears, or when the circumstances attending  
 20 the killing show an abandoned and malignant heart.” Cal. Penal Code § 188. When it is  
 21 established that a killing was the result of an intentional act committed with express or  
 22 implied malice, “no other mental state need be shown to establish the mental state as  
 23 malice aforethought.” Id.

24       “A person aids and abets the commission of a crime when he or she, (i) with  
 25 knowledge of the unlawful purpose of the perpetrator, (ii) and with the intent or purpose  
 26 of committing, facilitating or encouraging commission of the crime, (iii) by act or advice,  
 27 aids, promotes, encourages, or instigates the commission of the crime.” People v.  
 28 Richardson, 43 Cal.4th 959, 1023 (2008); People v. Cooper, 53 Cal.3d 1158, 1164 (1991).

1 The intent to render such aid must be formed prior to or during the commission of the  
2 crime. Cooper, 53 Cal.3d at 1164. A person may be convicted of murder based on his  
3 status as an aider and abettor. Spivey v. Rocha, 194 F.3d 971, 976-77 (9th Cir.1999);  
4 People v. Woods, 8 Cal.App.4th 1570, 1583-84(1992).

5 The testimony of a single witness is sufficient to uphold a conviction, Bruce v.  
6 Terhune, 376 F.3d 950, 957-58 (2004), and a federal court in a habeas corpus proceeding  
7 cannot redetermine the credibility of witnesses whom the federal court has not observed.  
8 Marshall v. Lonberger, 459 U.S. 422, 434 (1983). Rather, “[t]he reviewing court must  
9 respect the province of the jury to determine the credibility of witnesses, resolve  
10 evidentiary conflicts, and draw reasonable inferences from proven facts by assuming that  
11 the jury resolved all conflicts in a manner that supports the verdict.” Jones v. Wood, 114  
12 F.3d 1002, 1008 (9th Cir. 1997).

13 Detective James Tefet testified that he interviewed Nourn once she had  
14 contacted the police department about the murder. (RT at 130.) The second interview  
15 between Nourn and Detective Tefet was recorded. (RT at 131.) The recorded interview  
16 revealed Nourn’s verison of the events surrounding the murder. (RT 130-131; CT at 225-  
17 317.) Nourn admited that Barker was waiting for her when she returned from Stevens’  
18 apartment on the night of December 22, 1998. (CT at 280.) Barker questioned her about  
19 where she had been, and once she claimed Stevens raped her, Barker threatened to end  
20 the relationship. (CT at 260.) Previously the same evening, Stevens had told Nourn he  
21 wanted an exclusive relationship with her. (CT at 257.) Nonetheless, Nourn begged Barker  
22 “no please don’t do this... I love you.” (CT at 260.) Barker immediately began raging “I’m  
23 going to kill him [Stevens].” (CT at 262.) Barker appeared to reconsider his threats, and  
24 Nourn persisted, begging Barker “no please I want to stay with you.” (CT at 263.)

25 Barker told Nourn the “only way you stay with me is if you kill David or I kill  
26 David.” (CT at 263.) Nourn confirmed “I do anything you say.” (CT at 264.) Barker and  
27 Nourn then traveled to Barker’s house, after Nourn asked him if he had a gun. (CT at 264.)  
28

1 Nourn and Stevens then proceeded to Stevens apartment. (CT at 264.) Nourn  
 2 admitted that she was alone with Stevens in his car after she and Barker traveled back to  
 3 his apartment. (CT at 264.) Nourn followed Barker's devised plan and asked Stevens to  
 4 pull over when Barker "blinked" his lights. (CT at 266). Nourn introduced Stevens to  
 5 Barker as her brother.(CT at 267.) When Barker pulled out the gun after entering the car,  
 6 Nourn only then asked Barker "what are you doing." (CT at 269.) Only after the murder  
 7 did Nourn confess to Barker that Stevens did not rape her. (CT at 262.)

8 The detective asked Nourn "Did you ever tell Ron [Barker] to kill him?" Nourn  
 9 responded "No, I just told him, you do what you have to do. But then again I don't want  
 10 you to kill him." (CT at 300.)

11 Detective Tefet also recorded calls between Barker and Nourn. (RT at 146.) On the  
 12 calls Barker threatened Nourn that he would go to the police to confess to the murder  
 13 and implicate Nourn. (CT at 324.) Barker continuously asserted that Nourn would be  
 14 responsible for Stevens' murder. (CT at 324-325.) Barker told Nourn "you want me to do  
 15 it... You ask me to do this job... now you change your story Ny." (CT at 325.)

16 Detective John Young testified that he spoke with Nourn after the murder because  
 17 her number was on Stevens' answering machine. (RT at 174.) They talked for "no more  
 18 than two minutes" and Nourn only asserted that "she was an employee at Perfect Match  
 19 and she worked for David Stevens." (RT at 175.) Detective Young described her tone of  
 20 voice as "calm, [and] nonchalant." (RT at 176.) Nourn mentioned nothing about the  
 21 murder. (RT at 174-75.)

22 Here, as the California Court of Appeal found, there was ample evidence from  
 23 which the jury could determine Petitioner possessed the requisite implied malice and  
 24 knowledge of Barker's plan to convict her of aiding and abetting a second degree murder.  
 25 This evidence is more than sufficient to support Petitioner's second degree murder  
 26 conviction. Windham v. Merkle, 163 F.3d 1092, 1102 (9th Cir.1998); People v. Gonzales,  
 27 87 Cal. App. 4th 1, 10-11 (2001). Nourn knew Barker had a gun in his possession and  
 28 wanted Stevens dead. Furthermore, Nourn's own statements to Barker illustrate that she

1 agreed to "do anything" Barker demanded to keep their relationship alive, which  
2 implicitly meant Stevens had to die. There was ample evidence from which the jury could  
3 find that Nourn intended to aid Barker, knowing Barker's purpose, and consequently  
4 acted in reckless disregard of Stevens' life. Accordingly, the appeals court's denial of this  
5 claim was neither contrary to, nor an unreasonable application of, clearly established  
6 federal law. The Court recommends this claim be **DENIED**.

7 **E. Petitioner's Counsel Was Not Ineffective**

8 Nourn contends that her counsel provided ineffective assistance entitling her to  
9 habeas relief for two reasons: first, that he failed to object to prosecution's argument that  
10 allegedly violated the due process clause (Petition, Points and Authorities, at 31); and  
11 second, because he failed to object to a purported legally untenable theory of liability.  
12 (Petition at 8.)

13 The Court of Appeal declined to consider Petitioner's ineffective assistance of  
14 counsel claim on appeal. It noted that "because we conclude that no double jeopardy  
15 principles were implicated in this case, we need not reach Nourn's contention her counsel  
16 rendered ineffective assistance of counsel by failing to make a double jeopardy argument  
17 at trial." (Lodgement 6 at 12 n.4.) Nourn then filed a petition for review in the California  
18 Supreme Court which denied her petition without comment. (Lodgement 8.) The last  
19 reasoned state decision which addressed the merits of the claim is the California Court  
20 of Appeal's opinion affirming the trial judgment. (Lodgement 6.) It is to that decision that  
21 this Court must direct its analysis. Ylst, 501 U.S. at 805-6.

22 A claim of ineffective assistance of counsel is cognizable as a claim of denial of the  
23 Sixth Amendment right to counsel, which guarantees not only assistance, but effective  
24 assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686 (1984). The benchmark  
25 for judging any claim of ineffectiveness must be whether counsel's conduct so  
26 undermined the proper functioning of the adversarial process that the trial cannot be  
27 relied upon as having produced a just result. Id. The right to effective assistance counsel  
28

1 applies to the performance of both retained and appointed counsel without distinction.

2 See Cuyler v. Sullivan, 446 U.S. 335, 344-45 (1980).

3 To prevail on a Sixth Amendment ineffectiveness of counsel claim, Petitioner must  
 4 establish two things. First, she must establish that her counsel's performance was  
 5 deficient, i.e., that it fell below an "objective standard of reasonableness" under  
 6 prevailing professional norms. Strickland, 466 U.S. at 687-88. Second, she must establish  
 7 that she was prejudiced by her counsel's deficient performance, i.e., that "there is a  
 8 reasonable probability that, but for counsel's unprofessional errors, the result of the  
 9 proceeding would have been different." Id. at 694. A reasonable probability is a  
 10 probability sufficient to undermine confidence in the outcome. Id. The Strickland  
 11 framework for analyzing ineffective assistance of counsel claims is considered to be  
 12 "clearly established Federal law, as determined by the Supreme Court of the United  
 13 States" for the purposes of 28 U.S.C. § 2254(d) analysis. See Williams (Terry) v. Taylor, 529  
 14 U.S. 362, 404-08 (2000). It is unnecessary for a federal court considering a habeas  
 15 ineffective assistance claim to address the prejudice prong of the Strickland test if the  
 16 petitioner cannot even establish incompetence under the first prong. See Siripongs v.  
 17 Calderon, 133 F.3d 732, 737 (9th Cir. 1998).

18 Here, the record reflects that Petitioner's counsel thoughtfully considered the  
 19 prosecutions theory of liability, carefully reviewed jury instructions, and diligently  
 20 presented appropriate motions like the motion to acquit petitioner of murder. Petitioner  
 21 does not present any evidence that her counsel made errors. Nor does Petitioner show  
 22 that her counsel was unreasonable in making decisions. Thus, Petitioner has not  
 23 overcome the strong presumption that counsel's conduct fell within reasonable  
 24 professional norms.

25 Because Nourn cannot identify any conduct by which her counsel failed to meet  
 26 reasonable professional norms, and the Court of Appeal properly found that there were  
 27 no issues raised to which counsel should have objected on double jeopardy grounds the  
 28 Court recommends that this claim be **DENIED**.

1       **VI. CONCLUSION AND RECOMMENDATION**

2       After a review of the record in this matter, the undersigned Magistrate Judge  
3 RECOMMENDS that the Petition for Writ of Habeas Corpus be **DENIED** with prejudice.

4       This report and recommendation of the undersigned Magistrate Judge is  
5 submitted to the United States District Judge assigned to this case, pursuant to the  
6 provision of 28 U.S.C. § 636(b)(1).

7       **IT IS ORDERED** that no later than July 16, 2010, any party to this action may file  
8 written objections with the Court and serve a copy on all parties. The document should  
9 be captioned "Objections to Report and Recommendation."

10       **IT IS FURTHER ORDERED** that any reply to the objections shall be filed with the  
11 Court and served on all parties no later than July 30, 2010. The parties are advised that  
12 failure to file objections within the specified time may waive the right to raise those  
13 objections on appeal of the Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

14  
15 DATED: June 14, 2010

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Hon. William V. Gallo  
U.S. Magistrate Judge

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